

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
July 5, 2011

v

KELLY ANN JONES,

No. 298948  
Chippewa Circuit Court  
LC No. 09-00092-FC

Defendant-Appellant.

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Before: RONAYNE KRAUSE, P.J., and SERVITTO and GLEICHER, JJ.

RONAYNE KRAUSE, P.J. (*dissenting*)

I respectfully dissent and would affirm the trial court's sentence.

This case arises out of the death of defendant's 2½ year-old daughter, Ava, of morphine toxicity. Defendant and her three children, including Ava, resided with defendant's father and mother-in-law at the time. Defendant's husband, Ava's father, had died of a morphine overdose earlier in the year, and defendant's father died of a drug overdose about a month after Ava. Defendant was herself a drug addict whose addictions included shooting up morphine; Ava had tested positive for morphine when she was born. Government assistance and drug sales were the family's means of support. Defendant had been the subject of a controlled purchase of 20 morphine tablets about a month and a half prior to Ava's death, and that transaction was conducted in Ava's presence. Ava's blood tested positive for codeine and twenty times the toxic level of morphine, and her hair tested positive for morphine and hydrocodone; her brothers also tested positive for morphine. Apparently, defendant had been aware earlier in the evening that Ava had ingested morphine—it is not completely clear how, but it seems that defendant left some morphine pills out in a silver container on a bedside table within Ava's reach—and elected to do nothing more than monitor Ava because defendant was high at the time. However, defendant fell asleep. When defendant woke up in the early morning hours, she discovered Ava lifeless.

Defendant first argues that the trial court erred in scoring offense variable (OV) 1, MCL 777.31 (aggravated use of a weapon), and OV 2, MCL 777.32 (lethal potential of weapon possessed or used). This Court reviews a trial court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports the score. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009). If there is any evidence to support a score it will be upheld. *Id.* An OV score does not have to be consistent

with a jury verdict; rather, it must only be supported by evidence in the record. See *People v Perez*, 255 Mich App 703, 712-713; 662 NW2d 446 (2003), affirmed in part, vacated in part on other grounds, and lv den in part 469 Mich 415 (2003). Questions of law regarding the interpretation of the statutory sentencing guidelines are reviewed de novo. *Steele*, 283 Mich App at 490.

Under MCL 777.31, OV 1 should be scored at 20 points if the victim was subjected or exposed to a harmful chemical substance as defined by MCL 750.200h. MCL 777.32 provides for the scoring of OV 2 at 15 points if the offender possessed or used a “harmful chemical substance” as defined in MCL 750.200h. Section 200h(i) defines the term as “a solid, liquid, or gas that through its chemical or physical properties, alone or in combination with 1 or more other chemical substances, can be used to cause death, injury, or disease in humans, animals, or plants.” In *People v Blunt*, 282 Mich App 81, 83; 761 NW2d 427 (2009), the defendant had been convicted, among other crimes, of the unlawful use of a harmful chemical substance under MCL 750.200i(1)(b) for throwing heated cooking oil in the victim’s face. Construing § 200h(i) for purposes of the substantive offense as well as the application of OV 1 and OV 2, the Court concluded that the oil was not a harmful chemical substance. *Id.* at 85-86. A substance must “possess an inherent or intrinsic ability or capacity to cause death, illness, injury or disease” in order to satisfy the definition. *Id.* at 86.

Defendant asserts that morphine is approved by the Federal Drug Administration and is therefore not inherently or intrinsically harmful. However, unlike cooking oil, its chemical properties do have the capacity to cause death and injury. Without any alteration to its chemistry, morphine can cause great harm. Indeed, it is because it has this capability that it is a schedule 2 controlled substance. MCL 333.7124(a)(i). Even though the drug has medical benefits when properly administered, and a certain quantity might be necessary to cause harm, the chemistry does not change.<sup>1</sup> Accordingly, it qualifies as a “harmful chemical substance.”

As the majority discusses, the critical question is whether the morphine was a “weapon.” OV 1 fundamentally requires the *use of a weapon*, and although OV 2 may require only possession of a weapon, it appears that neither should be scored unless a “weapon” was involved in some way. Neither OV statute defines “weapon,” and I cannot find a definition of “weapon” elsewhere in the Michigan Compiled Laws.<sup>2</sup> This Court has explained that a “weapon” in the context of OV 1 can be an instrumentality that is fundamentally designed for bodily assault or defense, but it can also be anything else—such as a glass mug—when that thing is put to bodily assaultive or defensive *use*. *People v Lange*, 251 Mich App 247, 254-258; 650 NW2d 691 (2002). I would not deem anything designed to have a legitimate medical use a weapon *per se*,

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<sup>1</sup> Of course, any substance, even ordinary drinking water, *can* be over-consumed to the point of fatality. The important distinction is that one would have to make a special effort to make water dangerous, whereas one must take care to ensure that morphine is *not* dangerous.

<sup>2</sup> The majority observes that the Legislature has classified a number of things as weapons, but I do not believe the majority disputes that the Legislature has not defined “weapon.”

but any tool capable of being used is likely capable of being abused and, depending on the abuse, can thereby *become* a weapon. Clearly, morphine can be a weapon in context.

I depart from the majority's view of this matter because my reading of the applicable case law is that this Court should affirm a sentencing guidelines score if *evidence in the record* supports that score. See, e.g., *People v Jamison*, \_\_\_ Mich App \_\_\_, \_\_\_; \_\_\_ NW2d \_\_\_ (2011) (Docket No. 297154, slip op at p 3) ("This Court will uphold a sentencing court's scoring decision if there is any record evidence to support it"); *People v Elliot*, 215 Mich App 259, 260; 544 NW2d 748 (1996) ("Scoring decisions for which there is any evidence in support will be upheld."). The majority correctly recites the applicable quantum of evidence by which a *trial court* must find a fact proven in order to score a sentencing variable. *Ante* at \_\_\_ n 7, citing *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). However, *this* Court reviews the trial court's *scoring decision* by reference to *the record evidence*, not by reference to the trial court's remarks. It is my understanding that the scoring decision here was to score OV 1 at 20 points and OV 2 at 15 points. Therefore, this Court's review is to determine whether *the record evidence* supports that decision.<sup>3</sup>

It is apparently undisputed that Ava did somehow ingest one or more of defendant's morphine pills, and I find the evidence in the record sufficient to conclude that it was not accidental or voluntary, and so the morphine was used as a weapon under the circumstances.

The evidence indicated that morphine pills taste very bitter and would be instinctively spat out by a 2½ year old child; such a child would also probably not be able to swallow it whole. The levels of morphine in various parts of her body indicated that more than one pill must have been involved over some period of time. Drug testing of the child's hair suggested that she had probably received multiple high doses of morphine over some time prior to her death; the acute toxicity that killed her might have been reflected in the hair sample due to sweating, but the total amount in her hair was the highest amount the tester had seen in a child in fifteen years. The tester opined that this had probably not been the first time the child had come close to death. Two doctors opined that the cause of her death was homicide, which they defined as the intentional killing of another person. On the whole, the record amply supports a conclusion that the child did not consume a fatal dose of morphine by accident or of her own volition. Therefore, I conclude that the morphine was, under the circumstances, used as a weapon.

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<sup>3</sup> Of course, it is incontrovertable that the trial court's remarks in this case are baffling. But again, I believe our review is of the scoring decision itself. I would not uphold a scoring decision for which there is no evidence in the record, no matter what the trial court said, any more than I would now reverse a scoring decision that I find amply supported by the evidence in the record, again irrespective of the trial court's remarks. Affirming here is consistent with this Court's generally outcome-oriented policy of upholding correct results even if those results were based on incorrect reasoning.

The majority relies on the fact that the trial court declined to conclude on the record that defendant affirmatively administered the morphine to Ava.<sup>4</sup> Again, I agree that this apparent disconnect between the trial court's stated factual finding and its scoring decision does create an anomalous situation. However, such an incongruity is not fatal to the scoring decision. As noted, an OV score does not have to be consistent with a jury verdict; rather, it must only be supported by evidence in the record. *Perez*, 255 Mich App at 712-713. With the greater deference given to jury verdicts than to the findings of a trial court sitting as a trier of fact, I think that this Court's review of an OV score should be for consistency with the record evidence, not with remarks made by the trial court.<sup>5</sup> Because it does not appear from context that the trial court scored OV 1 and OV 2 by mistake, and because the trial court's scores for OV 1 and OV 2 are amply supported by the record evidence, the trial court's scores should be affirmed notwithstanding its commentary.

I agree with the majority's evaluation of OV 3.

Defendant next argues that the trial court erred in departing from the sentencing guidelines range. I agree with the majority that the trial court properly justified departing from the guidelines, but I disagree that the trial court failed to justify this specific departure. In *People v Smith*, 482 Mich 292, 299-300; 754 NW2d 284 (2008) (citations omitted), the Court stated:

Under MCL 769.34(3), a minimum sentence that departs from the sentencing guidelines recommendation requires a substantial and compelling reason articulated on the record. In interpreting this statutory requirement, the Court has concluded that the reasons relied on must be objective and verifiable. They must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention. Substantial and compelling reasons for departure exist only in exceptional cases. "In determining whether a sufficient basis exists to justify a departure, the principle of proportionality . . . defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed." For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant's conduct and prior criminal history.

The trial court may not base a departure "on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight."

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<sup>4</sup> Of less obvious relevance, the district court showed a similar reluctance.

<sup>5</sup> This operates in both directions, of course. Again, this Court would not uphold an OV score that lacks support in the record on the basis of a trial court's statements, either.

This Court “review[s] the reasons given for a departure for clear error,” whether a reason is objective and verifiable as a matter of law, and “[w]hether the reasons given are substantial and compelling enough to justify the departure . . . [and] the amount of the departure” for an abuse of discretion. *Id.* “A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes.” *Id.* (mismatched quotation mark omitted).

In sentencing defendant to a minimum of ten years, the court noted that it was the maximum allowable under the rule providing that a minimum sentence cannot exceed two-thirds of the maximum sentence. See MCL 769.34(2)(b). It found the need for a substantial penalty, citing the involvement with drugs to the extent it consumed defendant’s life, and the need for punishment, deterrence, and protection of society. The court cited the following reasons:

- (1) defendant violated the mother-child bond;
- (2) two other children were put at risk of harm;
- (3) defendant allowed the children to be taken care of by others using drugs who were “almost as dysfunctional as you are”;
- (4) the guidelines did not take the addiction and the extent to which it consumed defendant’s life and put her children at risk into account;
- (5) the guidelines did not take into account the effect of defendant’s actions on the two boys, who were innocent victims.

The court was aware of the facts already set forth above.

Preliminarily, defendant asserts that two of these factors were taken into account by the offense variables. OV 5 takes into account psychological injury to members of the victim’s family. MCL 777.35. It provides for a score of 15 points, which defendant received, if the psychological injury may require professional treatment. The trial court found that the guidelines did not take fully into account the effect of defendant’s actions on her two sons. Apart from the psychological injury, the boys lost their sister and were themselves subjected to morphine. These facts were not reflected in the score of OV 5 or taken sufficiently into account by the guidelines.

Defendant also argues that she was scored no points for OV 10, which is scored for exploitation of a vulnerable victim, including exploitation of a domestic relationship. MCL 777.40. Defendant’s score is the applicable score when “[t]he offender did not exploit a victim’s vulnerability”. MCL 777.40(1)(d). However, “exploit” means to “manipulate a victim for selfish or unethical purposes.” MCL 777.40(3)(b). Here, defendant’s actions or failures to act may have been negligent, the result of addiction, or injurious; but nothing in the record suggests that they were manipulative.

Moreover, the factors recited by the trial court were supported by the record. Defendant had put all of her children at risk by allowing her father—himself a drug abuser<sup>6</sup>—to care for the children, by her own drug use, by her carelessness with the medications around her children, and by failing to respond appropriately when she suspected that her daughter had overdosed. These reasons were objective and verifiable. All three children had morphine in their systems, defendant’s medications were in her daughter’s reach, defendant admittedly allowed her father to care for the children, there were drug transactions in the home, and defendant was prescribed methadone and was also getting morphine. The extent of defendant’s ambivalence toward her children’s care, the exposure to drug sales in the home, and the affect that the morphine and the death of their sister would have on the defendant’s boys are of considerable worth in determining the appropriate sentence. As with the trial court, these circumstances have keenly grabbed this Court’s attention.<sup>7</sup> Accordingly, there was no abuse of discretion in the determination that these reasons were substantial and compelling enough to justify a departure.

I disagree with the majority’s conclusion that the trial court failed to justify the extent of the departure, as well. Any sentence imposed must be “proportionate to the seriousness of the defendant’s conduct and to the defendant in light of his criminal record.” *Id.* at 305, quoting *Babcock*, 469 Mich at 262. Where a court determines that the guideline score does not meet the principle of proportionality and that departure is necessary, reasons in support of the extent of the departure must be given. *Smith*, 482 Mich at 303-304. Further, the “justification ‘must be sufficient to allow for effective appellate review.’” *Id.* at 304, quoting *People v Babcock*, 469 Mich 247, 259 n 13; 666 NW2d 231 (2003). If “the connection between the reasons given for departure and the extent of the departure is unclear,” the “sentence cannot be upheld.” *Id.* The trial court is not obligated to specifically justify each and every month by which it departed, but rather need only provide a basis for this Court to understand why it chose that departure. *Babcock*, 469 Mich at 260 n 14; *Smith*, 482 Mich at 304.

In analyzing the departure at issue in *Smith*, the Court observed that while not required, “reference to the [sentence range] grid can be helpful, because it provides objective factual guideposts that can assist sentencing courts in ensuring that the “offenders with similar offense and offender characteristics receive substantially similar sentences.”” *Id.* at 309 (citations omitted).<sup>8</sup> *Smith* also counsels that it can be of value to contrast “a defendant’s characteristics

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<sup>6</sup> Defendant’s father had apparently been abusive toward defendant and defendant’s mother as well, although defendant did not believe her father would intentionally harm her children.

<sup>7</sup> Again, the majority agrees that the trial court justified departing from the guidelines.

<sup>8</sup> *Smith* explains how the sentencing guidelines can act as a keystone to evaluating a sentence departure:

The statutory sentencing guidelines are based on statewide sentencing data. They reflect the Legislature’s judgment about how the variables of mitigation and aggravation should be applied to reach a proportionate sentence. Accordingly, the sentencing grids provide an objective source of data on sentencing. The statutory

and those of a hypothetical defendant whose recommended sentence is comparable to the departure sentence is a valuable exercise.”

In the present case, the court did articulate reasons for not only departing from the guidelines, but for imposing the specific sentence it imposed. The trial court imposed the maximum allowable sentence under the two-thirds rule, and it did so on the basis of the sheer egregiousness of the situation. As the majority observes, the trial court imposed a sentence generally reserved for the most egregious of offenders. However, the trial court clearly justified this on the basis of its finding that this case presented the most egregious of circumstances. While it appears that defendant’s troubles may have been the product of her own highly dysfunctional upbringing, the trial court was certainly accurate in describing defendant’s family dynamic, maternal bond with her children, care for her children’s well-being, and overall life as “a complete breakdown.” The trial court explained that it did not think that defendant was “a bad person,” but she had allowed her children’s environment to degenerate to an appalling degree that the sentencing guidelines simply did not take into account, to the extent that the maximum sentence under the two-thirds rule was warranted.<sup>9</sup> I agree, and I find no error in the trial court’s articulation of its basis for this particular departure.

I would affirm.

/s/ Amy Ronayne Krause

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guidelines, and the judicial guidelines that preceded them, were designed to avoid individual and regional variation in sentencing. Hence, using the grid as a reference point to assess and anchor a departure is an exercise well-designed to promote uniformity. [*Smith*, 482 Mich at 309-310 n 41.]

<sup>9</sup> My reading of *Smith* reveals no absolute prohibition against egregiousness as a justification for a departure. Rather, *Smith* admonished that this Court may not infer a trial court’s justifications for a departure from the record—the trial court itself must provide enough of an explanation that it is not “unclear why the trial court made a particular departure.” *Smith*, 482 Mich at 303-306. My reading of the record is that the trial court placed an adequate explanation on the record. I see nothing in our Supreme Court’s precedent to suggest that the trial court has ever been obligated to utilize some sort of mathematical formula or formulaic incantation. It is sufficient for the reviewing Court to be able to discern, from statements actually made by the trial court, why it believed the particular departure to be appropriate.